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PETITION FOR CERTIORARI

No. 611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

STATE OF DELAWARE,
Petitioner

v.

FRANCIS J. CURRAN, FRANCIS J. MAGUIRE and IRA F. JONES, JR.
Respondents

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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STATE OF DELAWARE,
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v.

FRANCIS J. CURRAN, FRANCIS J. MAGUIRE and IRA F. JONES, JR.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The State of Delaware prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on September 29, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the Superior Court of the State of Delaware is printed in Appendix B hereto, infra, page 1b and is reported in 10 Terry 350; 116 A 2d 782 (1955). The opinion of the Supreme Court of the State of Delaware is printed in Appendix B hereto, infra page 13b and is reported in 10 Terry 587, 122 A 2d 126. A petition for a Writ of Certiorari to this Honorable Court to review the latter opinion was denied and is reported in 352 U.S. 913 (1956). The opinion of

the United States District Court For The District of Delaware is printed in Appendix A hereto infra page 14a and is reported in 154 F. Supp 27. The opinion of the United States Court of Appeals For The Third Circuit is printed in Appendix A hereto, infra page 1a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 29, 1958, R. 7, p. 13a infra. The jurisdiction of this Court is invoked under 28 U.S.C. Sections 2241 and 2254.

QUESTIONS PRESENTED

Have respondents been denied due process of law as guaranteed to them by the Fourteenth Amendment, where the only error alleged is that a police officer gave a false answer as to the hour and number of copies of exculpatory statements signed by the petitioners, which justifies a Federal District Court to grant a Writ of Habeas Corpus after the State trial Court and the Delaware Supreme Court have carefully reviewed the alleged violation and concluded that respondents' constitutional rights had not been violated and this Court denied a Writ of Certiorari to review the State Court's decision?

STATEMENT

The respondents, Curran, Jones and Maguire, were sentenced to life imprisonment following a conviction for rape in the Superior Court of the State of Delaware in February, 1948. No appeal was taken. In 1953 the

respondents filed a petition for a Writ of Habeas Corpus in the Superior Court of the State of Delaware, asserting that at trial they were denied their constitutional rights. The petition was dismissed without prejudice on the ground that the proper remedy was to proceed under Rule 35 of the Delaware Criminal Rules of Procedure and not by petition for a Writ of Habeas Corpus.[1]

The respondents then proceeded under Rule 35 of the Delaware Criminal Rules of Procedure which provides for a post-conviction remedy. Relief under the Rule was denied by the Superior Court of Delaware.[2] The Supreme Court of Delaware affirmed the decision of the lower court and held that no constitutional rights of the respondents had been violated.[3] Subsequently, the respondents filed a petition for a Writ of Certiorari with this Court which was denied.[4] The respondents then filed a petition for a Writ of Habeas Corpus in the United States District Court for the District of Delaware. The State moved to dismiss the petition. The District Court by its opinion concluded the Writ should issue on the ground that respondents constitutional rights had been violated.[5]

Your petitioner appealed the Order of the District Court to the United States Circuit Court of Appeals for the Third Circuit. The Court of Appeal upheld the Order of the District Court which issued the Writ of Habeas Corpus.[6] The State of Delaware seeks review of the decisions of the District Court and the Circuit

1. Curran v. Woolley, 9 Terry 214, 101A.2d 303 (Del Super 1953) aff'd 9 Terry 382, 104A.2d 771 (1954).
2. State v. Curran, 10 Terry 350, 116A.2d 782 (Del Super 1955)
3. Curran v. State, 10 Terry 587, 122A.2d 126 (Del 1956)
4. Curran v. Delaware, 352 U.S. 913 (1956)
5. Curran v. Delaware 154 F. Supp. 27
6. Curran v. Delaware reported herewith Appendix page.

Court of Appeals by this petition for a Writ of Certiorari.

The following excerpts from the opinion of Chief Justice Southerland of the Supreme Court of the State of Delaware clearly state the factual background of this case and describe the circumstances surrounding the false testimony of the police officer in regard to the time and number of statements signed by the respondents:

"At some time after midnight on October 30, 1947 Jean Igle, 23 years old, unmarried, was waiting for a bus near the corner of Fourth and Union Streets in the City of Wilmington. An automobile passed and stopped. The three men were in it. Curran got out, approached the girl, and asked her for a match. She had none, and he offered to escort her home. She went with him. They walked west on Fourth Street, turned north (away from the direction in which lay her home), and went to a public park which extends for two blocks, from Fourth to Sixth Streets, along a railroad right of way. They entered the park. While there Curran attacked her, Maguire and Jones had followed them. All of them, she testified, ravished her. Two witnesses living in nearby houses heard screams. A woman in another nearby house called out to them: 'You had better leave that girl alone or I will call the cops.' At about a quarter of two a telephone call from an unknown woman was received at police headquarters. She said: 'Please send the police quick, there is a girl screaming down in the Park on Ferris Street, and I think she is being raped.'[1]

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1. This statement was not before the jury; but it appears to be admissible as a part of a spontaneous exclamation. VI Wigmore, Evidence Sec 1750.

"After the woman had called out and threatened to call the police, Maguire and Curran left. Jones walked with the girl to Fourth Street, where police officers, in two police cars found them. The girl, as soon as she was out of Jones' presence, made a complaint of rape."

"Jones was taken to the police station and the girl was sent to a hospital and examined. The medical and other testimony relating to her condition left no doubt that she had been subjected to brutal violence, and that sexual intercourse had taken place."

"Maguire and Curran were arrested shortly thereafter."

"At the police station all three men were questioned by the police officers and eventually signed statements. None of these statements admitted any violence. All three statements asserted, or tended to show, that the girl had consented to intercourse."

"After their arrest, all three defendants were questioned by officers of the Wilmington police during the early morning hours. Curran was questioned by Officer Nagle in the presence of two other officers. Jones and Maguire were questioned by Officer Rodenhiser in the presence of Officer Mazewski."

"After some preliminary questioning, all three men made and signed statements with respect to their actions. The purport of all three was that the girl had consented to intercourse, first with Curran and then with the others, although Maguire said that he did 'not remember' trying to have sexual intercourse with any woman in the park. Curran and Jones said they tried

to have intercourse but could not make penetration. None of these statements was a confession of the crime. Counsel made that point at the trial and the court agreed. Each statement, however, said in varying forms, that the girl was "moaning" while one or more of the men was attempting intercourse."

"The question before us concerns primarily the Jones and Maguire statements. For the sake of clarity, we shall first state what is now shown to have actually happened. The following facts are taken from the testimony and depositions taken in connection with the hearing on the petition, including a report of an investigation of the matter made by the direction of the Superintendent of The Department of Public Safety shortly after the trial.

"Detective Nagle took Curran's statement and typed it. After it was finished Curran refused to sign it because his name was spelled 'Kern'. Nagle immediately retyped the statement and Curran signed it. Nagle then telephoned Rodenhiser and advised him 'of such a mistake appearing in his statements'. Nagle then proceeded with other work. During this time Rodenhiser came to Nagle with the Jones and Maguire statements and asked Nagle to retype them because of the mistakes in the names and other typographical errors. Nagle was an experienced typist; Rodenhiser was not. Nagle remembered that the Jones statement was signed but did not remember whether the Maguire statement was signed. Nagle retyped both statements. It was approaching 8:00 A.M. when the work was finished. Nagle returned the two sets of statements to Rodenhiser. According to Rodenhiser, Mazewski took one of the statements (presumably Jones') down to

the cells and had it signed. We shall assume that the second Maguire statement was also signed. Rodenhiser then destroyed the original statements. Rodenhiser testified positively that the retyped statements were exact copies of the originals except for the corrections referred to. Superintendent Kavanaugh's investigation, made shortly after the trial, satisfied him that this was true.

"At the trial the three retyped statements were admitted in evidence. No objection was made to Curran's statement. Jones' counsel objected to his client's statement and requested voir dire examination in order to show that the statement was not voluntary. During this examination Rodenhiser was asked whether Jones signed another statement, and replied that Jones had not. This denial was reiterated at a later point during the State's case.

"Maguire's statement was admitted without objection.

"Each of the defendants testified that he had signed two statements. In rebuttal Rodenhiser was recalled, shown Jones' statement, and testified 'that particular statement' was signed by Jones about 4:00 A.M. Shown Maguire's statement, he testified that it was signed about 5:00 A.M.

"The record leaves no doubt that Rodenhiser's testimony was untrue. It is inconceivable to us that he could have failed to understand the point of counsel's questions. His explanation of the matter at the hearing below, which the State attempts to justify, is that there was in fact only one 'statement' because the 'statement' was the substance of what the men said—not the piece

of paper, and hence the matter was unimportant. This is mere equivocation. Counsel was entitled to the facts, and entitled to make such use of the facts as he saw fit. We think Rodenhiser's conduct on the stand highly reprehensible. As Judge Carey observed, a witness had no business deciding the importance of any particular question or line of testimony; it is his sworn duty to answer the questions put to him truthfully and fully. This Rodenhiser, an officer of the law, failed to do.

"The question before us is whether this misconduct robbed the defendants of their fundamental right to a fair trial."

REASONS FOR GRANTING THE WRIT

(1) The decision of the court below (Appendix A Page 1a) in the instant case and the decision of the Delaware Supreme Court (Appendix B, page 13b) are in direct conflict. The Delaware Supreme Court, after each member had read the entire record of the original trial, concluded that the defendants' rights had been scrupulously safeguarded by the trial court and that none of their constitutional rights had been violated and that false testimony of a witness upon a collateral or incidental point did not deprive the defendants of due process of law. (Appendix B, page 23b.) The Court below, Appendix A, page 12a concluded that false testimony (not perjury) had been introduced at the trial and as a result of the false testimony, the defendants had been denied due process of law as guaranteed to them by the Fourteenth Amendment.

After concluding that false testimony only was used at the trial, the Court below then proceeded to apply

the law applicable to cases in which perjured testimony is introduced. See *Mooney v. Holohan*, 294, U. S. 103, 55 S. Ct. 340, 79 L. Ed 791 (1935) and *Pyle v. Kansas*, 317 U. S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942).

To constitute perjury under Delaware Law, one must swear willfully, absolutely, and falsely, in a matter material to the issue or point in question. *State of Delaware v. Thomas*, 2 Boyce 20, 78 A. 640 (1910). In the instant case, the time, the exculpatory statements were signed and the number of statements were not material to the question in issue. The sole question at issue was: Was there penetration with force? Consequently, there was no perjury.

It is, therefore, submitted that the court below has extended the doctrine that the use of perjured testimony violates due process of law, *Mooney v. Holohan* and *Pyle v. Kansas* (supra) to include false testimony on a collateral or incidental point. As a result of this decision, there is, therefore, not only a conflict between the decisions of the Delaware Supreme Court and the Court below, but also, grave doubt as to the status of the law in general, in respect to use of false testimony, in contrast to perjured testimony in State trials. It is in the interest of the orderly administration of justice that this Court clearly establish the law in this field to be a guide in the future to State courts.

(2). The decision of the Court below is in conflict with the decisions of other Circuit Courts. The law, as applied to the use of perjured testimony in other Circuits, is that there must be deliberate use of the testimony by the prosecuting attorney. See *United States v. Spadafora*, 200 F 2d 140 (7 Cir. 1952); *United*

States v. Jakalski, 237 F 2d 503 (7 Cir. 1956); *Wild v. Oklahoma*, 187 F 2d 409 (10 Cir. 1951), *Tilghman v. Hunter*, 167 F 2d 661 (10 Cir. 1948); *Casebeer v. Hudspeth*, 121 F 2d 914 (10 Cir.), Cert. den. 316 U.S. 683 (1941), rehearing denied 317 U.S. 704 (1942); *Schechtman v. Foster*, 172 F 2d 339, (2 Cir. 1949), cert. den. 339 U.S. 924, 70 S. Ct. 613, 94 L. Ed. 1341. *Coggins v. O'Brien*, 188 F 2d 130 (1 Cir. 1951), cert. denied 338 U.S. 881, 70 S. Ct. 152.

Assuming, for the purpose of argument, that perjured testimony had been introduced in the instant case, such testimony was not deliberately used by the prosecuting attorney against the defendants. In view of these conflicting decisions, what constitutes due process of law under the Fourteenth Amendment varies for an individual, depending on what Circuit Court hears his case. It cannot be said that *Pyle v. Kansas* (Supra Page 11) clearly establishes the law to guide the various Circuit Courts, because the Circuit Court decisions cited have all been rendered since the decision of this Court in the Pyle case, in 1942.

It is submitted that this matter is of such importance that a further opinion of this Court is needed as a guide, not only to the Circuit Courts, which are in hopeless conflict, but also to the State Courts, which are faced with constant litigation involving the alleged use of perjured testimony in State criminal trials.

CONCLUSION

It is submitted that the petition for a writ of certiorari should be granted to clarify the existing conflicts in the law, as applied by the various Circuit Courts, re-

specting the use of perjured testimony in a trial; and also, a definitive statement by this Court whether the same principles of law apply to the use of false testimony, on a collateral or incidental point, as apply to the use of perjured testimony.

Respectfully submitted,

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Deputy Attorney General

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,397

FRANCIS J. CURRAN, FRANCIS J. MAGUIRE AND IRA F. JONES, JR.

v.

STATE OF DELAWARE,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued February 20, 1958
Before BIGGS, *Chief Judge*, and GOODRICH and KALODNER, *Circuit Judges*.

OPINION OF THE COURT
(Filed September 29, 1958)

By BIGGS, *Chief Judge*.

The following pertinent facts, succinctly stated by Mr. Chief Justice Southerland writing for the Supreme Court of Delaware, give much of the background necessary to understand the case at bar: "At some time after midnight on October 30, 1947 Jean Igle, 23 years old, unmarried, was waiting for a bus near the corner of Fourth and Union Streets in the City of Wilmington. An automobile passed and stopped . . . [Curran, Jones and Maguire] were in it. Curran got out, approached

the girl, and asked her for a match. She had none, and he offered to escort her home. She went with him. They walked west on Fourth Street, turned north (away from the direction in which lay her home), and went to a public park which extends for two blocks, from Fourth to Sixth Streets, along a railroad right of way. They entered the park. While there Curran attacked her. Maguire and Jones had followed them. All of them, she testified, ravished her. Two witnesses living in nearby houses heard screams. A woman in another nearby house called out to them: 'You had better leave that girl alone or I will call the cops.' At about a quarter of two a telephone call from an unknown woman was received at police headquarters. She said: 'Please send the police quick, there is a girl screaming down in the Park on Ferris Street, and I think she is being raped.'

"After the woman had called out and threatened to call the police, Maguire and Curran left. Jones walked with the girl to Fourth Street, where police officers, in two police cars, found them. The girl, as soon as she was out of Jones' presence, made a complaint of rape.

"Jones was taken to the police station and the girl was sent to a hospital and examined. The medical and other testimony relating to her condition left no doubt that she had been subjected to brutal violence, and that sexual intercourse had taken place.

"Maguire and Curran were arrested shortly thereafter.

"At the police station all three men were questioned by police officers and eventually signed statements. None of these statements admitted any violence. All

three statements asserted, or tended to show, that the girl had consented to intercourse.

"The jury found all the defendants guilty, and recommended them to mercy. They were sentenced to life imprisonment, the minimum term then permitted by the statute. Each defendant was represented by experienced counsel. No appeal was taken."[1]

The investigation of the crime—at least in its early stages—was conducted by Detective John A. Rodenhiser, Detective Charles F. McCool, Sergeant John Emering, assisted by Officers Nagle, Mazewski, Delloso, and other members of the Wilmington Bureau of Police. The statements, referred to in Mr. Chief Justice Southerland's opinion quoted above, signed by the three defendants, Curran, Jones and Maguire, were admitted in evidence at their trial in the Court of Oyer and Terminer, respectively as State's Exhibits, Nos. 10, 11 and 12. Curran's statement and that of Maguire were admitted without objection. Jones' counsel objected to the admission of his client's statement and examined Rodenhiser on voir dire, attempting to show that it had been procured by coercion. During the course of the voir dire examination[2] Rodenhiser was asked whether State's Exhibit No. 11 was the only signed statement procured from Jones. Rodenhiser replied that it was the only one.[3]

Curran's statement, State's Exhibit No. 10, admitted that he had twice attempted to have intercourse with the girl but that his attempts were unsuccessful. The statement contained the sentence: "This girl was

1 Curran v. State, 49 Del. 587, 588-589, 122 A.2d 126 (1956).
2 The jury not being present.
3 Rodenhiser enlarged upon this by testifying in rebuttal that the single statement was signed in triplicate.

moaning. . . . " Jones' statement, State's Exhibit No. 11, admitted unsuccessful attempts to have sexual intercourse with the complaining witness. It contained the sentence: "The woman was moaning. . . . " Maguire's statement, State's Exhibit No. 12, did not admit any attempt at intercourse by him. The statement contained the two following sentences: "Jones and I stood by and watched Curran on the ground with the woman. I heard the woman moaning 'You're hurting me.' "

The three defendants testified on their own behalf. Curran swore that he did not read his statement, State's Exhibit No. 10, before he signed it. Maguire testified that he "scanned" a statement which he signed. It does not appear whether or not the document which he scanned and signed was State's Exhibit No. 12. Maguire testified that he did not even scan a statement which he claimed to have signed in the afternoon and which may or may not have been State's Exhibit No. 12. Jones gave no evidence as to reading or scanning State's Exhibit No. 11, or any other statement. Each of the defendants denied that they had ever said that the complaining witness was "moaning".

All three defendants denied the accuracy of the statements in evidence. They also insisted that there were other statements signed by them and given to the police. But Detective Rodenhiser, called as the last witness at the very end of the State's case, in rebuttal, swore that Maguire's statement, State's Exhibit No. 12, was the only signed statement given by Maguire to

the police. Rodenhiser testified on rebuttal that Jones' statement, State's Exhibit No. 11, was the only signed statement[4] given by Jones to the police. To repeat for the sake of both clarity and emphasis, Rodenhiser swore plainly, positively and unequivocally that the statements of Jones and Maguire, State's Exhibits Nos. 11 and 12, were the only signed statements given by them to the police. The issue of the credibility of the defendants and that of the police was thus sharply before the jury.

It is now clear that a statement other than State's Exhibit No. 11 had been signed by Jones and given to the police. This other statement had been destroyed by the police. It is clear also that the police had taken another statement from Curran before State's Exhibit No. 10 had been signed. According to Officer Nagle, Curran had refused to sign the earlier statement because his name had been spelled "Kern" in it. Nagle testified that a new statement was typed with Curran's name spelled correctly in it and that Curran signed this statement. The original statement testified to by Nagle at no time was produced in evidence. It also appears that Maguire gave the police two statements but it is not clear that both statements were signed. One statement was de-

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4 Copies, of course, aside. See note 3, *supra*.

5 In 1955, defendants sought correction of the alleged illegal sentencing under Rule 35(a) of the Delaware Rules of Criminal Procedure and evidence of false and incorrect testimony at the criminal trial was adduced. See note 6, *infra*.

stroyed by the police. The other statement was signed and is State's Exhibit No. 12.[6]

As to Rodenhiser's veracity, Mr. Chief Justice Southerland said: "The record leaves no doubt that Rodenhiser's testimony was untrue. It is inconceivable to us that he could have failed to understand the point of counsel's questions. His explanation of the matter at the hearing below, which the State attempts to justify, is that there was in fact only one 'statement' because the 'statement' was the substance of what the men said —not the piece of paper, and hence the matter was unimportant. This is mere equivocation. Counsel was entitled to the facts, and entitled to make such use of the facts as he saw fit. We think Rodenhiser's conduct on the stand highly reprehensible. As Judge Carey observed [49 Del. 350, 357, 116 A.2d 782, 786], a witness has no business deciding the importance of any particular question or line of testimony; it is his sworn duty to answer the questions put to him truthfully and fully. This Rodenhiser, an officer of the law, failed to do."[7]

The Supreme Court of Delaware did not characterize Rodenhiser's testimony as perjurious but there can be no doubt that its conclusion was to that effect. We agree also with the conclusion of the Supreme Court that the phrases in the three statements introduced in

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6 It is not necessary to detail in this opinion the evidence which has accumulated to demonstrate the truth of the foregoing. It is set out clearly in the record.

Reference is made to Curran v. Woolley, 48 Del. 214, 101 A.2d 303 (1953), affirmed, 48 Del. 382, 104 A.2d 771 (1954); State v. Curran, 49 Del. 350, 116 A.2d 782 (1955), affirmed, 49 Del. 587, 122 A.2d 126, cert. den. 352 U.S. 913 (1956). See also Deposition of Andrew J. Kavanaugh, Superintendent of the Department of Public Safety of the City of Wilmington, before hearing on Motion on Rule 35(a) of the Delaware Rules of Criminal Procedure, State v. Curran, 49 Del. 350, 116 A.2d 782 (1955), Docket Entry #29.

7 49 Del. 587, 592-593, 122 A.2d 126, 129.

evidence that the complaining witness was "moaning" do not possess substantial probative effect on the issue of consent.[8] The two questions on which our decision must turn are, first, whether Rodenhiser's knowingly false evidence kept from the defendants facts which they were entitled to use as they saw fit, and second, whether it so damaged the defendants' credibility on the fundamental issue of consent as to render their trial fundamentally unfair and therefore constitute a denial of due process of law. Bute v. Illinois, 333 U.S. 640 (1948).

In respect to the first question, we state that the trial of a capital case, or indeed any other trial, no longer can be considered properly a game of wits and skills. It is clear that men on trial for their lives are entitled to all pertinent facts relating to their defense and that no witness is entitled to constitute himself the judge of what the court shall hear. As Mr. Chief Justice Southerland stated, counsel for defendants were entitled to the facts and to make such use of the facts as they saw fit. Had Jones' counsel on his examination of Rodenhiser on voir dire been told that Jones' statement, then marked for identification and later State's Exhibit No. 11, was not the only signed statement given by Jones and that

8 The opinion of the Supreme Court of Delaware stated, 49 Del. at p. 593, 122 A.2d at pp. 129-130: "Moreover, there is nothing incriminating in the statements. All of the defendants denied that they used the word 'moaning', but this is of little significance. In its context, it is consistent with the defense of consent, for the statements indicated that the men (or at least two of them) had tried and were unable to effect full penetration. The medical testimony indicated that the girl had been a virgin, and rude attempts at intercourse, though consented to, might well have caused pain. As to this point, the important issue was not whether the girl was 'moaning' but whether she was screaming. The defendants called three witnesses who said they were in the car with the defendants, followed them to the park, and heard no outcry."

"While we cannot agree with the conclusion expressed in the first sentence quoted above, it is immaterial to the issue here presented. The statements were incriminating to the extent that their contents, at least as to place and time, connected the three defendants with the commission of the crime charged in the indictment."

another signed statement previously in the possession of the police had been destroyed by them, we cannot doubt but that Jones' counsel would have questioned Rodenhiser as to why the statement had been destroyed. Jones' attorney could, and it must be assumed would have asked questions to bring out facts relating to the destruction of the statement. Jones' counsel undoubtedly would have inquired whether, for example, the destroyed statement contained material favorable to the accused, not included in the statement in evidence. Once the issue of the destruction of a statement had been opened, it must be assumed that counsel representing Curran and Maguire would have made similar inquiries. Evidence elicited by such examinations, if favorable to the defendants, could and would have been argued by their counsel to the jury and the trial court would have charged the jury appropriately in respect thereto.[9]

There is testimony to show that the questioning of the defendants by the police began about 2:45 A.M. on October 30th and continued until 4 or 4:30 P.M. Had it appeared that statements had been destroyed the defendants' counsel certainly would have been entitled to argue and would have argued the inference that members of the Bureau of Police continued the questioning of the defendants from time to time throughout this

9 In his deposition given in the course of the Rule 35(a) proceeding, see note 7, *supra*, Superintendent Andrew J. Kavanaugh stated in substance that the reason the statements were destroyed was that Rodenhiser believed that the original statements were unimportant and that the latter statements contained all matters of substance. Superintendent Kavanaugh is a police officer of great experience and unquestioned integrity but it cannot be assumed that the destroyed statements were harmless to the State's case and it is apparent from Superintendent Kavanaugh's deposition that neither he nor any other person could say then or can say now with accuracy what was contained in the destroyed statements.

period, getting several statements from them until the police had procured admissions more favorable to the State's case, destroying statements less favorable to the State's position. We are not to be understood as asserting that the members of the Bureau of Police did so conduct themselves but under the circumstances at bar such an inference can certainly be drawn.[10] The perjury of Rodenhiser denied to the defendants the opportunity to bring out facts which would have aided their defense.

We do not, however, hold that this alone was sufficient to cause the proceedings at the trial to pass the line of "tolerable imperfection"[11] and constitute fundamental unfairness. It is not necessary to decide this issue here for reasons which will appear immediately hereinafter.

We come now to the second question. The principal issue at the trial was whether the complaining witness had consented or had not consented to sexual intercourse. If the jury believed that the defendants had lied as to the number and kind of statements which they had given to the police, we think the defendants' testimony on the issue of consent might have been deemed by the jury to be entitled to little weight. The testimony of police officers usually is given credence by members of jury. Here the issue of credibility of the police and that of the defendants was brought sharply into focus. The State closed with the evidence of Rodenhiser in rebuttal on the very issue of the number of statements given

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10 The policy of a prolonged examination of defendants prior to arraignment by State officers, permitted to some extent by the Supreme Court of the United States in Cicenia v. Lagay, — U.S. — (1958), is not pertinent to the issue presented. See also Gallegos v. Nebraska, 342 U.S. 55 (1951).

11 See the opinion of the court below, 154 F. Supp. at p. 31.

by Jones and Maguire and that testimony must have had its effect on the jury. [12] We cannot assume to the contrary. The jury might indeed have regarded the assertions of the defendants that there had been other statements in the possession of the police as brazen falsehoods. The damage done to the defendants by Rodenhiser's false testimony may have been substantial in view of the pivotal issue of consent. The jury may well have applied the equivalent of the maxim *falsus in uno, falsus in omnibus.*

The State seemingly concedes, as indeed it must, that the suppression of evidence by a prosecuting officer is enough to constitute such fundamental unfairness as to amount to a denial of due process of law. Mooney v. Holohan, 294 U.S. 103 (1935); Townsend v. Burke, 334 U.S. 736 (1948); Berger v. United States, 295 U.S. 78 (1935). Cf. United States ex. rel. Almeida v. Baldi, 195 F.2d 815, 819 (3 Cir. 1952), cert. den. 345 U.S. 904, rehear. den. 345 U.S. 946 (1953). But the State contends in substance that the risk of perjured testimony must be run and that unless knowledge of such perjury is brought home to the prosecuting officers, there can be no basis for a finding of lack of due process in a habeas corpus proceeding.[13]

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12 A very substantial part of the evidence given at the trial related to the issue of the number of signed statements given by the defendants to the members of the Wilmington Bureau of Police.

Of the 1012 typewritten pages of the transcript of the trial, up to the presentation of prayers to the court, 168 pages concerned the statements Of these, 50 pages directly concerned the issue of the number of statements.

13 The State cites United States v. Jakalski 237 F.2d 503 (7 Cir. 1956). But the case cited is easily distinguished since in Jakalski there was a finding of no perjurious testimony.

Rule 35(a) of the Delaware Rules of Criminal Procedure is patterned on Section 2255, Title 28, U.S.C. To avoid confusion we point out that in the instant case the defendants are proceeding under Section 2241, Title 28, U.S.C.

In Mooney v. Holohan, 294 U.S. 103 (1935), it was alleged that the prosecuting attorney had knowledge of and had contrived a conviction by the presentation of testimony known by him to be perjured. Following that decision some federal courts indicated, despite the broad language[14] employed by the Supreme Court, that the principle of the Mooney case was limited to perjurious testimony brought home to prosecuting officers. See United States v. Spadafora, 200 F.2d 140 (7 Cir. 1952); Wild v. Oklahoma, 187 F.2d 409 (10 Cir. 1951); Tilghman v. Hunter, 167 F.2d 661 (10 Cir. 1948); Casebeer v. Hudspeth, 121 F.2d 914 (10 Cir.), cert. den. 316 U.S. 683 (1941), rehear. den. 317 U.S. 704 (1942). Without further interpretation of the Mooney decision, we conclude that this issue has been settled by Pyle v. Kansas, 317 U.S. 213 (1942).

An examination of the record in the Pyle case discloses, as the learned Judge below pointed out, that the prosecuting officer was in no wise a party to or cognizant of the perjured testimony given by certain witnesses of the State of Kansas or of the fact that the law enforcement officers had taken steps to procure false testimony

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14 The Supreme Court stated: "Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation *through the action of the State*, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." 294 U.S. at p. 112. (Emphasis added.)

We point out that "The Mayor and Council of Wilmington" is a creature of the State, chartered as a city by act of the Delaware Legislature in 1832. 8 Laws of Delaware c. CVIII, at p. 97 (1832). We can draw no pertinent distinction under the circumstances of the case between action by an instrumentality of "The Mayor and Council of Wilmington", *viz.*, the Bureau of Police of Wilmington, and "State" action under the Mooney and Pyle decisions.

favorable to the prosecution.[15] We conclude, as did the court below, that the knowingly false testimony of Detective Rodenhiser under the circumstances of the case at bar was sufficient to cause the defendants' trial to pass the line of tolerable imperfection and fall into the field of fundamental unfairness. In addition when we consider that the defendants were deprived of inquiry on the issue of why statements given by them were destroyed, we can entertain no doubt that the court below did not err in determining that the writ should issue. On the whole record we find that the defendants were denied due process of law as guaranteed to them by the Fourteenth Amendment.

We point out that in a proceeding such as that before us we do not and cannot pass on the guilt or innocence of the defendants. As was said in Chessman v. Teets, 354 U.S. 156, 165 (1957): "On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution."

The judgment of the court below will be affirmed.

15 It should be pointed out that in Pyle v. Kansas, 317 U.S. 213 (1942), the case was before the Supreme Court of the United States for review of an order denying an application for habeas corpus and the Court assumed for the purposes of the application that the facts alleged in the petition were true.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12, 397

FRANCIS J. CURRAN, FRANCIS J. MAGUIRE, AND IRA F. JONES, JR.

vs.

STATE OF DELAWARE,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: BIGGS, *Chief Judge*, and GOODRICH and KALODNER, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed, with costs.

Received & Filed Sept. 29, 1958.
IDA O. CRESKOFF, *Clerk*

Attest:
IDA O. CRESKOFF, *Clerk*

September 29, 1958

APPENDIX A

Opinion (U. S. D. C., D. Del.)

OPINION.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE.

HABEAS CORPUS NO. 12.

FRANCIS J. CURRAN, FRANCIS J. MAGUIRE, AND IRA F. JONES, JR.,

Petitioners,

v.

STATE OF DELAWARE,

Respondent.

Irving Morris (of Cohen and Morris) of Wilmington, Delaware, for Petitioners.

Joseph Donald Craven, Attorney General, and Frank O'Donnell, Jr., Deputy Attorney General, of Wilmington, Delaware, for Respondent.

WRIGHT, *District Judge.*

The petitioners, Curran, Maguire and Jones were sentenced to life imprisonment following a conviction for rape in the Superior Court of the State of Delaware in February, 1948. In 1953 the petitioners filed a petition for a Writ of Habeas Corpus in the Superior Court of the State of Delaware, asserting that at trial they were denied their constitutional rights. The pe-

tition was dismissed without prejudice on the ground that the proper remedy was to proceed under Rule 35 of the Delaware Criminal Rules of Procedure and not by petition for a Writ of Habeas Corpus.[1]

The petitioners then proceeded under Rule 35 of the Delaware Criminal Rules of Procedure which provides for a post-conviction remedy. Relief under the Rule was denied by the Superior Court of Delaware.[2] The Superior Court was affirmed in its denial of relief by the Supreme Court of Delaware, which held no constitutional rights, State or Federal, had been violated.[3] Subsequently, the prisoners filed a petition for a Writ of Certiorari with the Supreme Court of the United States. The writ was denied.[4]

The matter is now before this court on application by the three prisoners for a Writ of Habeas Corpus. The issue presented is whether false and evasive testimony of a police officer in a criminal case deprives defendants of constitutional due process when such testimony serves the threefold function of being cumulative evidence of the State's case-in-chief, of suppressing evidence which the defense was entitled to use as it saw fit, and finally, of impeaching the credibility of the defendants. The issue is not one of guilt or innocence of these defendants. The problem is whether that degree of "fundamental fairness essential to the very concept of justice"[5] as required by the Due Process Clause of the Fourteenth

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1. Curran v. Woolley, 9 Terry 214, 101 A. 2d 303 (Del. Super. 1933) aff'd. 9 Terry 382, 104 A. 2d 771 (Del. 1954)
2. State v. Curran, 10 Terry 350, 116 A. 2d 782 (Del. Super. 1955)
3. Curran v. State, 10 Terry 587, 122 A. 2d 126 (Del. 1956)
4. Curran v. Delaware, 352 U. S. 913 (1956).
5. Lisenba v. California, 314 U. S. 219, 236 (1941); Lyons v. Oklahoma, 322 U. S. 596, 605 (1944).

Amendment was achieved in the rape trial of these defendants. The heinous and brutal nature of the crime and the probabilities or possibilities of the establishment of guilt in accordance with the procedure demanded by the Federal Constitution are not before this court.[6] That nine years have elapsed since conviction is of no concern, for the overriding responsibility is to redress violations of the Constitution of the United States, regardless of when such violation occurs.[7]

Was the trial of Curran, Maguire and Jones void for lack of due process? At the trial, the defense was based upon consent to carnal knowledge and inability to penetrate. The State as part of its case, introduced, over objection of one of the defendants, exculpatory statements taken from each of the defendants. Since introduced by the State in its case-in-chief, the statements must be characterized as substantive evidence aiding the State in linking the defendants to the commission of the crime. Even though the evidence used for this purpose be cumulative, a conviction obtained by use of the statements must be set aside, if, when considered together with other factors, the trial is rendered fundamentally unfair to the accused. This result must follow even though evidence apart from the statements might have been sufficient to sustain the verdict.[8]

Detective John Rodenhiser, in charge of the investigation of the crime, testified there was only one statement signed by each of the defendants. Each of the defendants had previously testified he had signed two

6. Cf. Chessman v. Teets, 25 L. W. 4420 (1957).
7. Id.
8. Cf. Malinski v. New York, 324 U. S. 401, 404 (1945).

statements. In rebuttal, toward the very end of the case the State recalled Rodenhiser who reiterated his testimony as to the number of statements. The effect of the conflicting testimony between the three defendants and Rodenhiser was twofold. In the first place, by suppressing the facts surrounding the "original" set of statements, defense counsel was deprived of the ability to make such use of this set of statements as might have been in the interest of petitioners. Secondly, and possibly more important, the contradiction in testimony served to permit the State to impeach the all-important credibility of the defendants by effective collateral attack.

Eight years subsequent to trial, it was developed there were two sets of statements, and that the original statements had been destroyed prior to trial by Rodenhiser. In the words of the Supreme Court of Delaware, "Rodenhiser's conduct on the stand was highly reprehensible" and "the record leaves no doubt that Rodenhiser's testimony was untrue."[9]

It has been argued the lack of overwhelming convincing evidence that the two statements differed, coupled with the non-incriminating nature of the statements and the failure of counsel to argue the point before the jury, rendered the statements unimportant to the outcome of the case. The court cannot agree. Of the 1085 pages of trial record, 175 pages concern the statements. Of the 1085 pages of trial record, 920 pages consist of testimony and comment by court or counsel in the presence of the jury. Of these 920 pages, 124 pages concern the statements. It is true, the larger percentage

9. Curran v. State, 10 Terry 587, 592, 593, 122 A. 2d 126, 129 (Del. 1956).

of these 124 pages was concerned not with whether there were one or two statements but with whether the statements were voluntary. Nonetheless, the State deemed the issue of the number of statements so important that it recalled Detective John Rodenhiser in rebuttal as the last witness to be heard before the case went to the jury. Rodenhiser again laid particular stress upon the fact that there was only one statement and that the only statement taken was the one in evidence.

When reviewed in the context of the proceedings at trial, the strength of the State's position with respect to the false testimony and its effect on the jury's decision is placed in serious doubt. The court cannot be a vehicle to resolve state conjecture caused by a state wrong. Where there is false and evasive testimony resulting in suppression of evidence possibly vital to the defense, and which is also relevant to the State's case and defendant's credibility, it is not the court's function to speculate on whether the prejudice knowingly injected into the case by a police officer caused a conviction.

Whenever a defendant takes the stand in a criminal trial his credibility is put in issue, and in every such case if there is a conviction the testimony of the defendant has been successfully discredited. What facet of the testimony in a case may discredit a defendant or affect his credibility in the eyes of a jury is speculative. It may be the strength of the State's case or the improbability of the story of the accused. It may be some isolated bit of testimony which although relevant, in the opinion of a court, should be given little weight in determining guilt or innocence.

Although the testimony of a witness may be upon a collateral issue and seemingly of little or no significance or help in reaching the conclusion of guilt or innocence, the standing of the witness in his community or his connection with a law enforcement agency of the State or City may magnify the importance of the testimony to a jury. Where the false and evasive testimony is that of a high ranking police officer in active charge of the criminal investigation, this court cannot say the testimony was immaterial to the outcome.

The concept that the use of perjured testimony is a denial of due process received its first consideration as dicta in the celebrated case of *Mooney v. Holohan.*[10] In its per curiam opinion the Supreme Court said that the requirement of due process:

> "... in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. ... It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its law, may con-

10. 294 U. S. 103 (1935)

stitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.' . . . "

Following what they deemed to be the rule of the opinion in the Mooney case, some Federal Courts held that false and perjured testimony of a witness was not a denial of due process unless brought home to the prosecuting officers.[11]

In Pyle v. Kansas, [12] the dicta of the Mooney case was crystallized into law. But in the Pyle case the prosecuting attorney had no knowledge the testimony was perjured at the time it was received in evidence.[13] In Pyle v. Kansas it was alleged the witness was forced to give perjured testimony under threats by local authorities and the Kansas state police. The Supreme Court held the allegations were sufficient, if proved, to deprive the petitioner of the rights guaranteed to him by the Federal Constitution. The rationale of the court's decision in Pyle v. Kansas is the action of police officers as well as prosecuting officers on behalf of the State may constitute State action within the meaning of the Fourteenth Amendment.[14]

While untarnished administration of justice is one of the most cherished aspects of our governmental institutions perfection has not been achieved, and is not

11. Wild v. State of Oklahoma, 187 F. 2d 409 (10 Cir. 1951); Tilghman v. Hunter, 167 F. 2d 661 (10 Cir. 1948); Casebeer v. Hudspeth, 121 F. 2d 914 (10 Cir. 1941).

12. 317 U. S. 213 (1942).

13. In this connection, see also, Jones v. Commonwealth, 97 F. 2d 335 (6 Cir. 1938).

14. See also: Concurring opinion of Mr. Justice Frankfurter in Fikes v. Alabama, 352 U. S. 191 (1957).

guaranteed by the Fourteenth Amendment. Federal due process does not assure to a defendant a trial free from false and evasive testimony. Nor is the purpose of due process to punish misconduct of prosecuting officers or the police. On the other hand, the Fourteenth Amendment does guarantee a State shall not deprive an accused of certain fundamental rights.[16]

The line between tolerable imperfection and fundamental unfairness in a criminal trial is not clearly discernible. It must be determined which side of the line the false and evasive testimony of Detective John Rodenhiser causes this case to fall. This court is of the opinion the denial of the prior existence of the original statements by a high ranking police officer in direct contradiction to the testimony of the defendants, constitutes fundamental unfairness in the trial of a criminal case.[17]

The writ should issue. The issuance of the writ, however, does not preclude a new trial or the taking of proper steps to hold the defendants in custody pending such a new trial.

An order in accordance herewith may be submitted.

At Wilmington,
August 15, 1957.

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15. Hodge v. Huff, 140 F. 2d 686 (D. C. Cir. 1944).
16. Rea v. United States, 350 U. S. 214 (1956).
17. Pyle v. Kansas, 317 U. S. 213 (1942); Mooney v. Holohan, 294 U. S. 103 (1935); United States v. Dye, 221 F. 2d 763 (3 Cir. 1955); Jones v. Commonwealth, 97 F. 2d 335 (6 Cir. 1938).

ORDER.

The petition of Francis J. Curran, Francis J. Maguire, and Ira F. Jones, Jr., for a writ of habeas corpus having been presented to and duly considered by the Court, in accordance with the opinion herein filed on August 15, 1957,

IT IS HEREBY ORDERED that the petition be and is hereby granted; and

IT IS FURTHER ORDERED that the petitioners be released from the custody of the State Board of Corrections of the State of Delaware; and

IT IS FURTHER ORDERED, that the execution of the foregoing order directing the release of the petitioners be stayed pending an appeal of this matter by the State of Delaware to the United States Circuit Court of Appeals.

CALEB M. WRIGHT,
Judge, United States District Court.

Approved as to form and contents:

IRVING MORRIS,
Attorneys for Petitioners.

FRANK O'DONNELL,
Chief Deputy Attorney General,
State of Delaware.

Dated: August 27, 1957.

APPENDIX B

SUPERIOR COURT OF DELAWARE OPINION

STATE v. FRANCIS J. CURRAN, FRANCIS J. MAGUIRE and IRA F. JONES, JUNIOR.

October 3, 1955

In the Superior Court of the State of Delaware, in and for New Castle County.

Motion pursuant to Rule 35(a) of the Superior Court Rules of Criminal Procedure.

RICHARDS, P. J., TERRY and CAREY, J. J., sitting.

Irving Morris and John M. Bader for Petitioners.

Stephen E. Hamilton, Junior, Deputy Attorney General, for the State.

Rule 35(a) of the Superior Court Rules of Criminal Procedure contains the following provisions:

"The Court may correct an illegal sentence at any time.

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside,

or correct the same. Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is not entitled to relief, the court shall cause notice thereof to be served on the Attorney General, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate".

The motion filed on behalf of the defendants sets forth, that they were found guilty of the crime of rape by a jury at the January Term 1948, of the Court of Oyer and Terminer for New Castle County, and sentenced to be imprisoned for life on March 15, 1948.

It further sets forth that the trial was improperly conducted, was prejudicial and unfair in violation of the Laws and Constitution of the State of Delaware, and in violation of the Fourteenth Amendment of the Constitution of the United States and of certain other constitutional guarantees for the preservation of individual justice, liberty and due process of law; by reason of which the defendants were unjustly deprived of their liberty;

That certain typewritten statements, signed by the defendants, were introduced into evidence by the State,

over the objection of the defendants, which materially contributed to their improper conviction;

That said typewritten statements were false and untrue in part and were not voluntarily made, because defendants were induced to sign them without reading them by wilful misrepresentations made by certain police officers;

That the police officers who appeared as witnesses knew that the statements were obtained by misrepresentation, knew that they were false, and that they were introduced into evidence for the sole purpose of insuring the unjust and improper conviction of the defendants;

That the police officers who testified at the trial perjured themselves by falsely testifying that the statements introduced into evidence were the only statements taken by the police, when as a matter of fact, they knew that they had prepared two different and distinct sets of statements which had been signed by the defendants;

That the police officers deliberately and in dereliction of their duty, with intent to suppress evidence favorable to the defendants, refused to accept and act on information of eye witnesses to the alleged crime, evading their duty to ascertain all available evidence which could have been presented to the Grand Jury;

That the Court failed to define the crime of rape in the charge to the jury in the manner required by law.

The motion then alleges that the defendants are not guilty of the crime of which they were convicted, and prays that after notice upon the Attorney Gen-

eral and hearing by the Court, such an order be made as shall seem right and just under the law.

RICHARDS, P. J.:

We are unable to find any justification for the contention that the trial was improperly conducted in a manner which was prejudicial and unfair to the defendants, and in violation of certain constitutional guarantees for the preservation of individual justice, liberty and due process of law.

The defendants Jones and Maguire were represented by counsel of their own selection, H. Albert Young and David J. Reinhardt, Junior, both of whom were experienced trial lawyers, and the Court appointed Leonard G. Hagner, an experienced trial lawyer and former Deputy Attorney General, to represent the defendant Curran.

Counsel for the defendants requested, that while the jury was being drawn to try the case, when the jurors called were being examined upon the voir dire, that they be allowed to ask in addition to the usual questions prescribed by the statute, certain other questions in order to determine whether they were entitled to challenge for cause. After a conference, additional questions were agreed upon to be asked both by the State and the Defendants. This was unusual at that time in the trial of a capital case in this State and had never been allowed before except in one or two instances. The trial lasted seven days and counsel were given ample opportunity to examine and cross-examine the witnesses. In addition they were allowed to take any course

in conducting the defense permissible under the constitution and laws of this State.

This contention was not supported by counsel for the defendants in their briefs or enlarged upon at the hearing.

It appears from the evidence admitted at the trial, from the depositions taken and from the testimony taken at the hearing on this motion, that the defendants Jones and Maguire signed two separate pieces of paper, designated as statements, only one of which was introduced in evidence at the trial. The evidence discloses that the original statements of these two defendants were taken and typed by Detective John Rodenhiser at the Police Station. Finding some typographical errors and misspelled words in these original statements, Detective Rodenhiser had them re-typed by Patrolman Nagle and signed by Jones and Maguire, Maguire being down in the cell block at the time he signed it. After these re-typed statements had been signed the original statements signed by these defendants were destroyed by Detective Rodenhiser. During his testimony at the trial Detective Rodenhiser failed to state that he destroyed the original statements which he took from Jones and Maguire. In fact, he testified that he took only one statement from these defendants, which was the one introduced in evidence. The contention is made by the defendants that this testimony of the detective was not only untrue and misleading to the jury, but prejudicial to their rights and contributed to their conviction. The defendants further contend, that the second statements were not the same as the first statements in that they contained the word "moan" or

"moaning" which did not appear in the first statements.

The State contends that the defendants are confusing two statements with two pieces of paper; and that the second piece of paper signed by the defendants was simply a re-typed copy of the original statement signed by the defendants which was the same as the first.

There seems to be no doubt that two statements were signed by the defendants Jones and Maguire, or that the second statements were a re-typed copy of the first. It is true that Detective Rodenhiser testified at the trial that they signed only one statement. The defendants testified that they signed two statements and contradicted the testimony of Detective Rodenhiser. The defendants also testified that the statements introduced in evidence were not the same as the first statements they signed because they contained the word "moan" or "moaning" which was not in the first statements.

This contention that the statements introduced in evidence were not the statements originally signed by the defendants, and that they were not the same as the original statements because they contained the word "moan" or "moaning", is the most important contention made by the defendants.

All of the testimony in reference to the statements, the number signed, where they were signed, when they were signed and what they contained was before the jury and was doubtless given consideration. Each one of the defendants contradicted the officers who testified, including Detective Rodenhiser, and insisted that more than one statement was signed by them. They testified positively that the statements admitted in evidence

were not the original statements signed by them and contained different language. The defendant Curran when asked if the prosecuting witness, Jean Igle, was making a noise, replied that she was making passionate gestures. All of the defendants testified that they heard a woman call from a nearby house, to leave that girl alone or she would call the police, or words to that effect. The operator at the switch board in the Police Station testified that a woman called there and reported the noise in the park. What this noise consisted of does not appear. Whether Jean Igle was actually moaning does not appear. The Jury, however, had this testimony of noise in park before it in considering whether the defendants used the word "moan" or "moaning", in their statements to the officers concerning what took place in the park.

The fact that the original statements were torn up by Detective Rodenhiser after they were re-typed was not brought out at the trial, and did not become known until it was brought out in the depositions and the evidence taken at the hearing on this motion. The only explanation given by Detective Rodenhiser for having the statements taken and written by him re-typed, and destroying the originals, was his desire to have his work present as good an appearance as possible, and his lack of experience in work of that nature.

This information that the original statements taken and written by Detective Rodenhiser, were destroyed by him after they were re-typed, was the only information in reference to the statement made by the defendants which was not brought out before the jury.

This is not sufficient to justify this Court to grant the relief prayed for in this motion.

All of the material evidence in connection with the statements of the defendants was before the jury at the time it rendered its verdict.

The case of Equitable Trust Company v. Gallagher, , 102 A. (2) 538, is not applicable to the case now before the Court.

The contention that the police officers refused to accept and act on information of eye witnesses to the alleged crime, evading their duty to ascertain all available evidence which could have been presented to the Grand Jury, is without merit in this proceeding.

The presentation of the charges against the defendants before the Grand Jury, not only occurred before the case was tried in this Court, but before the Court acquired jurisdiction over it. The Attorney General determines the witnesses to testify before the Grand Jury in support of indictments presented by him. He also determines the witnesses to testify for the State in criminal cases prosecuted before this Court. The three eye witnesses referred to, namely, Schuler, Masten and Fahey, who were also in the automobile with the defendants on the evening in question, were called as witnesses for the defendants and the jury had the benefit of their testimony.

The further contention is made, that the Court failed to define the crime of rape to jury in the manner required by law. What particular portion of the law in reference to rape the Court failed to charge on, or in what respect the charge failed to define the crime of

rape as applied to the particular case, is not stated. The charge is supported by numerous charges which have been made in this State in prosecutions for rape.

The draftsmen of the Rules of Criminal Procedure for the Superior Court, made the following comment in reference to Rule 35(a):

> "Rule 35(a) is a combination of the first sentence of Federal Rule 35 and Uniform Rule 44 and amplifies and enlarges upon the Federal Rule 35. The adoption of the draft will provide for relief now obtainable by writ of Error Coram Nobis or Habeas Corpus. The failure of the Federal Rules to provide for such relief has been criticized".

The rule does not give one who has been found guilty of a crime the right to have the case tried over again. It is intended to grant relief when the substance of a fair trial has been denied followed by the imposition of sentence. 4 Barron Federal Practice and Procedure (Supp.) Sec. 2306.

It was held in the case of In Re Shepherd, 195 Fed. (2) 157, a motion which alleged that a plea of guilty had been based upon a confession obtained unlawfully, and that movant entered his plea of guilty under misapprehension, did not state a proper case for relief under Federal Rule 35.

The movants have failed to show that sentence was imposed on them in violation of the constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that is was in excess of the maximum sen-

tence authorized by law or is otherwise subject to collateral attack.

This being the case the motion must be denied.

CAREY, J., concurring:

In my opinion, something more needs to be said concerning the testimony of Detective Rodenhiser at the original trial. Although he was on the stand for a considerable length of time, he said nothing about the fact that the original written statements were destroyed after they had been retyped and that the papers actually put into evidence were the second ones not typed by him but signed by Jones and Maguire. He seeks to excuse this by now saying that he thought the matter was unimportant, and that the proper questions were not asked of him so as to give him a chance to tell about the episode. A witness, of course, has no business deciding upon the importance of any particular question or line of testimony; his sworn duty is to answer the questions put to him truthfully and fully.

As to the suggested excuse that no opportunity was given him to explain this matter, it seems plain to me that there were at least three places in the questioning when a full and truthful answer would necessarily have included this information. I quote only one of those instances, which occurred during examination by Mr. Young:

"Q I hand you State's Exhibit No. 11. Is that the statement that you took from Ira Jones?

A It is.

Q At what time?

A At 2:45 A.M., starting at 2:45 A.M.

Q Did you type it yourself?

A I did."

The officer now admits under oath that he did not type this piece of paper, that the one he typed was destroyed, but that this particular exhibit was an exact copy of the one he did type. I cannot understand how he could possibly have understood the questions above quoted to refer to anything other than the piece of paper that was then shown to him and identified by him. Moreover, while this witness was still on the stand, a lengthy colloquy took place between counsel and the Court, the nature of which could only indicate to him that the matter was of importance and so considered by counsel. Immediately after he left the stand, a recess was taken. Notwithstanding this, he admittedly made no effort to tell the Attorney General or any one else about the retyping episode.

Regardless of the category into which this testimony should be placed, nevertheless the witness was certainly guilty of conduct of a censorable character, regardless of its actual effect upon the outcome of the trial. If we pass this sort of thing in silence, we may be thought to give our sanction to such conduct.

This does not mean that petitioners are entitled to a new trial because of that evasive testimony of this witness. To warrant such relief under Rule 35(a) there must be a showing that a retrial could reasonably be expected to result in a different verdict and judgment. United States v. Bowen, 94 F. Supp. 1006, aff'd. 192 F. 2d. 515, cert. den. 343 U.S. 943, 988; U.S. v. Moore, 166

F. 2d. 102. Under all the evidence in this case, no such likelihood appears. The only criticism which petitioners have ever made of the statements admitted into evidence is that they never used the word "moaning". The only basic issue in the case was whether the victim consented. We know from other evidence presented that she was making some kind of noise, which must have been the result of fear or pain on her part; otherwise there would have been no phone call to the police station and there would have been no woman yelling to these boys to leave the girl alone. Accordingly, it makes little difference whether the proper word was "moaning" or something else. In short, I cannot believe that there would have been any difference whatever in the outcome of the trial had the full facts concerning the aforesaid retyping been disclosed to the jury.

I, therefore, concur with the result reached in Judge Richards' opinion. I am authorized to say that Judge Terry concurs with what has been said herein.

Appendix B

Opinion (Supreme Ct. of Del.)

OPINION.

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 18, 1955.

FRANCIS J. CURRAN, FRANCIS J. MAGUIRE AND IRA F. JONES, JR.,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

(April 16, 1956.)

SOUTHERLAND, C. J., and WOLCOTT and BRAMHALL, J. J., sitting.

Appeal from an order of the Superior Court for New Castle County, dismissing a petition for post-conviction relief under Rule 35 of the Rules of Criminal Procedure. Affirmed.

Irving Morris of Cohen and Morris, of Wilmington, for appellants.

Frank O'Donnell, Jr., Deputy Attorney General, for the State.

SOUTHERLAND, *C. J.*:

In February, 1948, the appellants, Curran, Maguire and Jones, were convicted of the crime of rape. A brief summary of the State's evidence at the trial is as follows:

At some time after midnight on October 30, 1947 Jean Igle, 23 years old, unmarried, was waiting for a bus near the corner of Fourth and Union Streets in the City of Wilmington. An automobile passed and stopped. The three men were in it. Curran got out, approached the girl, and asked her for a match. She had none, and he offered to escort her home. She went with him. They walked west on Fourth Street, turned north (away from the direction in which lay her home), and went to a public park which extends for two blocks, from Fourth to Sixth Streets, along a railroad right of way. They entered the park. While there Curran attacked her. Maguire and Jones had followed them. All of them, she testified, ravished her. Two witnesses living in nearby houses heard screams. A woman in another nearby house called out to them: "You had better leave that girl alone or I will call the cops." At about a quarter of two a telephone call from an unknown woman was received at police headquarters. She said: "Please send the police quick, there is a girl screaming down in the Park on Ferris Street, and I think she is being raped."[1]

After the woman had called out and threatened to call the police, Maguire and Curran left. Jones walked with the girl to Fourth Street, where police officers, in two police cars, found them. The girl, as soon as she was out of Jones' presence made a complaint of rape.

1. This statement was not before the jury; but it appears to us to be admissible as part of a spontaneous exclamation. VI Wigmore, *Evidence*, § 1750.

Jones was taken to the police station and the girl was sent to a hospital and examined. The medical and other testimony relating to her condition left no doubt that she had been subjected to brutal violence, and that sexual intercourse had taken place.

Maguire and Curran were arrested shortly thereafter.

At the police station all three men were questioned by police officers and eventually signed statements. None of these statements admitted any violence. All three statements asserted, or tended to show, that the girl had consented to intercourse.

The jury found all the defendants guilty, and recommended them to mercy. They were sentenced to life imprisonment, the minimum term then permitted by the statute. Each defendant was represented by experienced counsel. No appeal was taken.

In 1953 the prisoners filed a petition for habeas corpus, asserting that in several respects they had been denied at the trial their constitutional rights. The judge dismissed the petition without prejudice, holding that habeas corpus was not the proper remedy, that remedy being a proceeding under Rule 35 of the Criminal Rules of Procedure. *Curran v. Woolley*, 48 Del. 214, 101 A. 2d 303. We affirmed, 104 A. 2d 771.

The prisoners then filed a petition under Rule 35 of the Rules of Criminal Procedure, relating to correction or reduction of sentence. Paragraph (a) of that rule provides a post-conviction remedy to a prisoner claiming, among other things, that his sentence was imposed in violation of the constitution and laws of this

State or of the United States, or that the Court imposing such sentence was without jurisdiction to do so. Its obvious purpose is to provide at least as wide a post-conviction remedy as the remedies afforded by coram nobis and habeas corpus. It is similar to the provisions of 28 USCA § 2255. It is undoubtedly designed to afford post-conviction relief of sufficiently broad scope to comply with the holdings of the Supreme Court of the United States relating to federal review under 28 USCA § 2254 of State convictions for crime alleged to have been obtained in violation of federal constitutional rights. See, for example, *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397. But our rule also refers to convictions obtained in violation of our State constitution and laws. We think the purpose of Rule 35(a) is to afford a simple and efficient remedy to any prisoner who claims that his conviction was obtained by a disregard of the fundamental fairness essential to the very concept of justice. Cf. *Wilson v. State*, Del. , 109 A. 2d 381.

This does not mean that Rule 35(a) is a substitute for a writ of error, as suggested in the comments of the draftsmen of the rule. We agree with Judge Layton's observation in *Curran v. Woolley*, *supra*, to the effect that the remedy under Rule 35(a) cannot serve as a substitute for a writ of error. Error of law at the trial is ordinarily reviewable only by appeal.

The prisoners assert that they were denied the substance of a fair trial because their conviction was obtained upon perjured testimony given by one of the police officers who testified against them. They say that he falsely testified that he had taken from Jones and Maguire one written statement; whereas, it now appears

that he had taken two statements, and destroyed the first; notwithstanding which he identified the second statements as the first and only statements signed by them:

The facts are these:

After their arrest, all three defendants were questioned by officers of the Wilmington police during the early morning hours. Curran was questioned by Officer Nagle in the presence of two other officers. Jones and Maguire were questioned by Officer Rodenhiser in the presence of Officer Mazewski.

After some preliminary questioning, all three men made and signed statements with respect to their actions. The purport of all three was that the girl had consented to intercourse, first with Curran and then with the others, although Maguire said that he did "not remember" trying to have sexual intercourse with any woman in the park. Curran and Jones said they tried to have intercourse but could not make penetration. None of these statements was a confession of the crime. Counsel made that point at the trial and the court agreed. Each statement, however, said in varying forms, that the girl was "moaning" while one or more of the men was attempting intercourse.

The question before us concerns primarily the Jones and Maguire statements. For the sake of clarity, we shall first state what is now shown to have actually happened. The following facts are taken from the testimony and depositions taken in connection with the hearing on the petition, including a report of an investigaton of the matter made by direction of the Superintendent of The Department of Public Safety shortly after the trial.

Detective Nagle took Curran's statement and typed it. After it was finished Curran refused to sign it because his name was spelled "Kern". Nagle immediately retyped the statement and Curran signed it. Nagle then telephoned Rodenhiser and advised him "of such a mistake appearing in his statements". Nagle then proceeded with other work. During this time Rodenhiser came to Nagle with the Jones and Maguire statements and asked Nagle to retype them because of the mistakes in the names and other typographical errors. Nagle was an experienced typist; Rodenhiser was not. Nagle remembered that the Jones statement was signed but did not remember whether the Maguire statement was signed. Nagle retyped both statements. It was approaching 8:00 A.M. when the work was finished. Nagle returned the two sets of statements to Rodenhiser. According to Rodenhiser, Mazewski took one of the statements (presumably Jones') down to the cells and had it signed. We shall assume that the second Maguire statement was also signed. Rodenhiser then destroyed the original statements. Rodenhiser testified positively that the retyped statements were exact copies of the originals except for the corrections referred to. Superintendent Kavanaugh's investigation, made shortly after the trial, satisfied him that this was true.

At the trial the three retyped statements were admitted in evidence. No objection was made to Curran's statement. Jones' counsel objected to his client's statement and requested voir dire examination in order to show that the statement was not voluntary. During this examination Rodenhiser was asked whether Jones signed another statement, and replied that Jones had

not. This denial was reiterated at a later point during the State's case.

Maguire's statement was admitted without objection.

Each of the defendants testified that he had signed two statements. In rebuttal Rodenhiser was recalled, shown Jones' statement, and testified that "that particular statement" was signed by Jones about 4:00 A.M. Shown Maguire's statement, he testified that it was signed about 5:00 A.M.

The record leaves no doubt that Rodenhiser's testimony was untrue. It is inconceivable to us that he could have failed to understand the point of counsel's questions. His explanation of the matter at the hearing below, which the State attempts to justify, is that there was in fact only one "statement" because the "statement" was the substance of what the men said—not the piece of paper, and hence the matter was unimportant. This is mere equivocation. Counsel was entitled to the facts, and entitled to make such use of the facts as he saw fit. We think Rodenhiser's conduct on the stand highly reprehensible. As Judge Carey observed, a witness has no business deciding the importance of any particular question or line of testimony; it is his sworn duty to answer the questions put to him truthfully and fully. This Rodenhiser, an officer of the law, failed to do.

The question before us is whether this misconduct robbed the defendants of their fundamental right to a fair trial.

We do not think so, for the following reasons:

(1) There is no sufficient evidence that the retyped

statements differed from the original in any material matter. Rodenhiser did not do the retyping. It was done by Nagle, and there is no suggestion that Nagle and Rodenhiser were conspiring to foist a fraudulent statement upon any defendant.

Moreover, there is nothing incriminating in the statements. All of the defendants denied that they used the word "moaning", but this is of little significance. In its context, it is consistent with the defense of consent, for the statements indicated that the men (or at least two of them) had tried and were unable to effect full penetration. The medical testimony indicated that the girl had been a virgin, and rude attempts at intercourse, though consented to, might well have caused pain. As to this point, the important issue was not whether the girl was "moaning" but whether she was screaming. The defendants called three witnesses who said they were in the car with the defendants, followed them to the park, and heard no outcry.

As to Jones, the statement taken by the officers did not include an incriminating admission made when he was found with the girl by the police. He told Officer McDermott that she screamed so loud that a neighbor raised the window and threatened to call the police. In the statement taken by Rodenhiser, this admission is not found—certainly an indication that the examining officers were not attempting to extort a confession or to distort Jones' language.

Counsel argues that the destruction of the original typed copies is a badge of fraud, and raises a presumption that the statements were different. *Equitable Trust Co. v. Gallagher*, 32 Del. Ch. 401, 102 A. 2d 538, is cited.

That was a case of the destruction of all existing copies of a contract, and is not in point here. If manufactured evidence had been the purpose of the second statements, why did they not include something incriminating?

(2) Each member of this Court has read the entire record of the trial for rape. The Court has also been furnished with a transcript of the addresses to the jury of all three counsel for the defendants, and of the closing address for the State. We are convinced that the issue concerning the two statements played no material part at the trial. The point was not argued to the jury. The issue before the jury was whether the girl had consented to have intercourse with these men. Counsel for the defendants directed their attack not only against the girl's story, but sought to belittle the medical evidence, and urged the jury to accept the evidence of the three witnesses who said they heard no screaming. We are satisfied that the issue of the two statements played no material part in the case. And the State's evidence, together with the inherent improbability of the defendants' testimony, amply justified the verdict.

Counsel argue that the issue made at the trial was a question of the girl's veracity against the defendants' veracity. In resolving this conflict, they say, the jury could well have believed that Rodenhiser's denial of the second statement so discredited the defendants' testimony as to turn the scales against them and result in conviction. This is too narrow a view of the matter. The case depended not merely on the girl's testimony that she did not consent; its strength derived from the attendant circumstances above referred to. Counsel's argument on this point is an attempt—natural enough—

to magnify unduly an incident that could have wrought no serious harm to the defendants.

Counsel argues that as a matter of law perjury by officers of the State, though not implicating the prosecuting officer, is sufficient in itself to rob the trial of fundamental fairness. Cf. *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340; *People v. Steele*, 65 NYS 214. These cases involved the use of perjured testimony to convict, and the participation of the prosecuting officer. The federal rule appears to be that perjury by a witness is not a denial of due process unless brought home to the prosecuting officer. See, for example, *Casebeer v. Hudspeth*, 121 F. 2d, 914; *Tilghman v. Hunter*, 167 F. 2d 661; *Hinley v. Burford*, 183 F 2d 581; *Wild v. Oklahoma*, 187 F. 2d 409.

It is not necessary in this case to decide whether this is a sound general rule for our courts in reviewing a conviction under Rule 35. It is conceivable that a case might be so shot through with perjury, though unknown to the prosecuting officer, as to lead to the conclusion that the prisoner had never had the semblance of a fair trial. But no such case is made here. Due process does not and cannot guarantee to a defendant complete immunity from false testimony; and hence false testimony of a witness is not in itself ground for the conclusion that fundamental constitutional rights have been violated. To warrant relief under Rule 35, much more must be shown than appears in this case.

Counsel argues that if a defendant's constitutional rights are violated at the trial the reviewing court will not pause to determine the probable effect of the violation upon the verdict, but will set it aside. *Leyra v. Den-*

no, 347 U.S. 556, 74 S. Ct. 716; *United States v. Morgan*, 222 F. 2d 673. This is no doubt true, but counsel's argument begs the question. What constitutional right was violated here? It is not a case of an extorted confession, as in the Denno case, or a case of failure to provide counsel, as in the Morgan case. It is simply, as above stated, a case of false answers given by a witness upon a collateral or incidental point.

We may add that our reading of the record convinces us that the trial of the defendants was fair in all respects. The defendants' rights were scrupulously safeguarded. Indeed, in one or two instances, the trial court's rulings on evidence against the State appear to us to have been unnecessarily strict.

We are of the opinion that the defendants have failed to show any violation of their constitutional rights at their trial.

The judgment of the Superior Court is affirmed.